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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING TRIBAL SOVEREIGN IMMUNITY AND SECTION 329
1997 INTERIOR APPROPRIATIONS BILL

September 24, 1996

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the principle of tribal sovereign immunity and on the integral function which sovereign immunity serves in empowering Indian tribal governments and in advancing self-determination.

From the first days of our Republic, the United States has recognized Indian tribes as governments. There are presently over 500 federally acknowledged tribes within the borders of the United States. These tribes range from very small to very large, both in membership and in the scope of tribal territory. Despite this variety, one thing they all have in common is the sovereignty that is inherent to government, regardless of size or type of organization. Congress recently expressly affirmed the sovereign status of tribes in the 1994 "Federally Recognized Indian Tribe List Act," stating, "the United States has a trust responsibility to recognized Indian tribes . . . and recognizes the sovereignty of those tribes." In this Act, Congress validated the authority of the Secretary of the Interior to maintain a list of acknowledged tribes. In publishing this list, the Secretary has consistently indicated that listed tribes possess "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, limitations and obligations of such tribes." 60 Fed. Reg. 9250, 9251 (1995); 25 C.F.R. § 83.2 (1996).

Article I, Section 8, of the United States Constitution vests the federal government with the power to regulate commerce with Indian tribes. In 1831, Chief Justice John Marshall examined the status of tribes in relation to the United States and determined that tribes were neither states nor foreign nations. He characterized them as "domestic, dependent nations," possessing attributes of sovereignty and yet dependent upon the protection of the United States. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The Supreme Court's holding in Cherokee Nation must, of course, be read against the background of the United States' solemn pledge to protect Indian tribes, which was

frequently set forth in early Indian treaties. Art. III, Treaty with the Cherokee, 1785, 7 Stat. 18. One year later, Chief Justice Marshall noted that this dependent status does not strip tribal governments of their inherent sovereignty and that states generally lack jurisdiction in Indian country. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Thus, tribes are sovereign nations and possess all powers of government, except those which have been expressly extinguished by Congress or, as the Supreme Court has ruled, are inconsistent with overriding national interests. Tribes can adopt and operate under their chosen form of government; levy taxes; license and regulate activities; define conditions of tribal membership; exclude persons from tribal territories; exercise zoning authority; make and enforce laws, both civil and criminal; and establish tribal courts of law. In addition, Congress has delegated federal powers and authority to tribes in a number of statutes.

The final two attributes of sovereignty are related to our discussion today, and I would like to present a brief summary of tribal criminal and civil jurisdiction before examining the doctrine of sovereign immunity. The scope of tribal criminal jurisdiction is fairly straightforward and is governed largely by federal statutes. With the exclusion of enumerated "major crimes," a tribe has jurisdiction over Indians within Indian country. A state has no criminal jurisdiction over tribal members in Indian country except in states subject to the provisions of Public Law 280.

However, the contours of tribal civil jurisdiction are considerably more complex, as they are not established by federal statutes. Since tribal civil jurisdiction concerns those matters which are linked most intimately with tribal identity, the exercise of broad tribal civil jurisdiction is essential to the maintenance of a vigorous tribal government. The Supreme Court has indicated that tribes may regulate activities of non-Indians on fee lands who enter consensual relationships with the tribe or tribal members or whose activities otherwise directly affect the political integrity, economic security, or health or welfare of the tribe. Montana v. United States, 450 U.S. 544, 565-66 (1981).

The retention of significant tribal powers in the regulatory arena is matched by expansive tribal court jurisdiction over civil matters, as evidenced in subsequent Supreme Court rulings. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16, 18 (1987) (tribal courts best qualified to interpret and apply tribal law; tribal authority over activities of non-Indians on reservation land an important part of tribal sovereignty); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) (requiring plaintiffs to exhaust tribal court remedies; exercise of

jurisdiction over non-Indians presents federal question, reviewable by federal court). The reservation of jurisdiction to tribal courts over civil matters arising within Indian country springs from the pre-existing government authority of Indian tribes and is maintained by the United States' respect for the government-to-government relationship between tribes and the United States.

The United States recognizes that states should not have judicial authority over Indian tribes. Rather, tribal justice systems remain the most appropriate forums for the adjudication of disputes affecting tribes, as well as those affecting personal and property rights. Congress recognized the importance of tribal courts in passing the 1992 Indian Tribal Justice Support Act, 25 U.S.C. § 3601(6), although no funds have been appropriated for its implementation.

Despite limited funding, tribes have developed systems to meet the growing demands of tribal communities and changing tribal economies. The vast majority of tribes do not have the resources or revenues to develop the justice systems they envision. The President's Fiscal Year 1995 and 1996 budget requests included funds to implement the Indian Tribal Justice Support Act. Proposed regulations establishing funding levels to be awarded to eligible Indian tribes for use in establishing or enhancing traditional or contemporary justice systems were published on July 30, 1996.

In September 1995, mandated by the Indian Tribal Justice Support Act, the Bureau of Indian Affairs competitively awarded a contract to a non-federal entity to conduct a survey of conditions of tribal justice systems and Courts of Indian Offenses. This study will determine resources and funding, including base support funding, needed to provide for expeditious and effective administration of justice. Compilation of the results of the survey will begin in the next fiscal year.

A corollary to these sovereign powers of regulatory and judicial authority is the common law doctrine of sovereign immunity. Since a sovereign can mandate laws and create courts to interpret and apply these laws, it follows that a sovereign cannot be sued absent its consent. The roots of this doctrine are in English and continental law, and American courts have subsequently adopted and modified it. Consent to be sued is best given in clear terms, although courts have occasionally found implicit waivers. American governments explicitly have consented to suit to such an extent in, for example, the Federal Tort Claims Act, that sovereign immunity may serve more as the exception than as the rule. Indeed, where Indian tribes contract to perform federal functions under the Indian Self-Determination Act, the Federal Tort Claims Act system is available in certain circumstances to redress alleged grievances by individuals

affected by those operations. It is important to note, however, that Congress established this system without waiving tribal sovereign immunity.

It is well established that the doctrine of sovereign immunity applies to Indian tribes, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted), as it does to state and federal governments. See also Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 172-73 (1977). Most recently, the Supreme Court in Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991), stated:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. . . . Congress has consistently reiterated its approval of the immunity doctrine [in Acts which] reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

498 U.S. at 510 (citations omitted). The Supreme Court concluded that, "Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." Id. Thus, Indian tribal sovereign immunity retains its full vitality.

However, tribes have the ability to waive, and have in fact partially waived, their sovereign immunity when it was necessary for practical reasons for them to do so, as in water rights agreements, mineral leases, and other commercial enterprises. There are limitations on the types of activities for which tribes will waive sovereign immunity, as is true with state and federal waivers.

Tribes, like state and federal government, are cautious about waiving their sovereign immunity, as this would undermine the goals of Indian self-government and tribal self-sufficiency and economic development. A blanket waiver would allow anyone, Indian or non-Indian, who believes that a proposed tribal action might affect his or her property interests to sue the tribe and tribal officials in state or federal court to halt the tribe's action and to recover damages for any harm the court finds that the tribal action produced. This would flood state and federal courts with litigation over matters that historically have been reserved to tribal courts, or that have been resolved through the political process or through actions for injunctive relief in the federal courts. Non-Indians who choose to live in Indian country could scorn tribal government and seek to have the courts of the historically hostile non-Indian neighbors of the tribes empowered to take control of the affairs of the tribe. Such a sweeping

curtailment of tribal sovereignty would equal that of the Termination Era.

Current tribal sovereign immunity prevents disgruntled tribal members from forcing the tribe to litigate disputes in other courts. Were tribal members permitted to sue tribes in state courts, this effectively gives state courts the authority to interfere in the conduct of internal tribal government. This also would distort the development of tribal court jurisprudence and increase the chances of generating inconsistent decisions.

Such lawsuits would place a tremendous financial burden on tribes due simply to the costs of defending litigation in non-tribal forums. In addition, the threat of suit would have a chilling effect on tribal activities in general and could paralyze economic development for tribes.

There must be no link of a waiver of sovereign immunity by those tribes which accept federally appropriated funds to the receipt of those funds. Such an approach creates a situation in which a tribe would have to waive its sovereign immunity in order to accept judgment funds and even the interest on judgment funds, as tribal council use of these is typically authorized by the general language in the BIA portion of Interior's appropriations statute. Judgment funds are the tribes' money. When the United States pays what it owes a tribe for a wrong committed against the tribe, it should not attach burdensome and sovereignty-impairing conditions to the payment of what is rightfully the tribe's money, free and clear.

Tribes are one of three sovereigns recognized as such under the United States Constitution and possess inherent powers of self-governance. This governmental status has been recognized in an unbroken line of Supreme Court cases dating to the earliest days of the Republic. Any erosion of tribal sovereign immunity would undermine one of the most fundamental principles of government.

I am pleased to have the opportunity to present the views of the Department of the Interior on this subject to the authorizing committee of jurisdiction.